

FILED

July 6 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-10-0125

KIMBERLY M. KELLER)
)
Petitioner/Appellant,)
)
v.)
)
LIBERTY NORTHWEST, INC.)
)
Respondent/Appellee.)

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APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE WORKER'S COMPENSATION COURT OF
MONTANA

APPEARANCES:

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
A. APPELLANT SEEKS TO RESCIND DUE TO A MEDICAL ERROR, NOT DUE TO AN UNEXPECTED OUTCOME	6
B. THE WORKER'S COMPENSATION COURT APPLIED AN INCORRECT BURDEN OF PROOF	9
CONCLUSION	17
CERTIFICATE OF COMPLIANCE	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

STATUTES

MCA §28-2-409	12
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CASES

<i>Bailey v. Ewing</i> , (1983), 105 Idaho, 636, 671 P.2d 1099	9
<i>Carey v. Wallner</i> , 23 Mont. 260 (1986) 725 P.2d 557	9, 10
<i>EBI Orion Group v. State Compensation Mut. Ins. Fund</i> , 249 Mont 449, 453, 816 P.2d 1070, 1073 (1991)	4
<i>Flynn v. Uninsured Employers Fund</i> , 2005 MT 269, 329 Mont. 122, 122 P.3d 1216	3
<i>Gamble v. Sears</i> , 2007 MT 131, 337 Mont. 354, 160 P.3d 537.	15, 16
<i>Harrison v. Liberty Northwest Ins. Corp.</i> , 2008 MT 102, 342 Mont. 326, 181 P.3d 598	3
<i>In re Abfalder</i> , 2003 MT 180, 316 Mont. 415, 75 P.3d 1246	4
<i>Kienas v. Peterson</i> , 191 Mont. 325, 329 (1980) 624 P.2d 1	15
<i>Kimes v. Charlies Fam. Din. & Donut Shop</i> , 233 Mont. 175, 759 P.2d 986 (1988)	16
<i>Kruzich v. Old Republic Ins. Co.</i> , 2008 MT 205, 188 P.3d 983	3, 6-8, 16, 17
<i>Simms vs. State Compensation Ins. Fund</i> , 2005 MT 175, 327 Mont. 511, 116 P.3d 773	4
<i>Weldele v. Medley Development</i> , 227 Mont. 257, 738 P.2d 1281 (1987)	16
<i>Wolfe v. Webb</i> , 251 Mont. 217, 230, 824 P.2d, 240, 248 (1992)	4, 16

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ISSUES PRESENTED FOR REVIEW

1. Whether the Worker's Compensation Court properly rejected Appellant's request for rescission of her two worker's compensation settlements.
2. Whether the Worker's Compensation Court erred as a matter of law that Appellant was required to prove that the insurer had no knowledge of Appellant's medical condition of scapular winging and long thoracic nerve injury at the time the parties entered into settlement agreements.

STATEMENT OF THE CASE

Appellant suffered a long thoracic nerve injury and consequent scapular winging as the result of an on-the-job injury in January 2005. Pretrial Order ¶2; WCC Finding of Fact ¶6. This was not what she was treated for. Although a physician assistant saw scapular winging and suspected a long thoracic nerve injury, WCC Finding of Fact ¶¶7, 9 and 10, medical doctors treated Ms. Keller for a thoracic disc injury¹. The doctors who provided care after taking over from the physician assistant disregarded scapular winging and long thoracic nerve injury throughout the course of care.

Appellant settled her indemnity benefits in January, 2007 and her

¹ See Exhibit 4-8, 4-9, 4/27/2005 records of M. Brown, MD; Exhibit 13-9 to 13-11, 9/28/2005 records of C. Beck, MD;

medical benefits in August 2007 without receiving confirmation of her long thoracic nerve injury. See WCC Findings of Fact ¶¶23, 25. That confirmation did not come until August-September, 2008, when an EMG was performed. See records of Dean Ross, MD, WCC Exhibit Nos. 20-9 to 20-10; WCC Finding at ¶27.

When the Worker's Compensation Court adjudicated Appellant's request to rescind her two settlements, it concluded that Appellant was required to prove that the insurer had no knowledge of the scapular winging and long thoracic nerve injury at the time that the parties entered into the 2007 settlement agreements. In seeking reversal 2/16/2010 WCC Findings, Conclusions and Judgment, Appellant challenges this conclusion of law.

STANDARD OF REVIEW

The standard of review on the Worker's Compensation Courts conclusions of law is de novo. Harrison v. Liberty Northwest Ins. Corp., 2008 MT 102, §11, 342 Mont. 326, ¶11, 181 P3d 598, ¶11; Flynn v. Uninsured Employers Fund, 2005 MT 269, ¶11, 329 Mont. 122, ¶11, 122 P3d 1216, ¶11.

The Worker's Compensation Court's findings of fact are entitled to substantial deference. Kruzich v. Old Republic Ins. Co., 2008 MT 205, ¶17, 188 P3d 983 ¶17. The Supreme Court simply reviews the Worker's Compensation

Court's factual findings to determine whether they are supported by substantial credible evidence. In re Abfalder, 2003 MT 180, ¶10, 316 Mont. 415, ¶10, 75 P3d, 1246, ¶10. Evidence will be considered substantial even if it is contradicted by other evidence, even if it is somewhat less than a preponderance, even if it is inherently weak. EBI Orion Group v. State Compensation Mut. Ins. Fund, 249 Mont 449, 453, 816 P2d 1070, 1073(1991); Wolfe v. Webb, 251 Mont. 217, 230, 824 P2d, 240, 248 (1992). See also Simms vs. State Compensation Ins. Fund, 2005 MT 175, ¶11, 327 Mont. 511, ¶11, 116 P3d 773 ¶11.

STATEMENT OF THE FACTS

Petitioner was injured on January 3, 2005 while employed by A Full Life Agency, Superior, Montana. She was lifting a patient who weighed approximately 200 lbs while providing home health services for the patient. Keller and the patient began to fall over and Keller suffered an injury, diagnosed initially by a physician assistant in Thompson Falls, Montana. See WCC Exhibit 1-2, records of PA Strine; WCC Exhibit 4-1, records of PA Brown.

Physician assistant Jennifer Strine PA-C, saw Appellant in February and March, 2005. PA Strine found a noticeable irregularity of the scapula on the right and diagnosed right thoracic strain and scapular dysfunction secondary to muscular weakness. WCC Exhibit 1-2 to 1-8, records of PA Strine.

Liberty Northwest referred Appellant to a medical doctor, Maurice Brown, MD in Polson. Dr. Brown had an assistant, Cody Brown, do an initial evaluation which repeated PA Strine's observations of scapular winging, but Dr. Maurice Brown focused on a thoracic disc injury and referred Appellant for follow-up on that disc injury. See WCC Trial Exhibit No. 4-8 to 4-9.

For the entire time between April 2005, and the settlement of indemnity benefits in January, 2007, the only references by medical providers to scapular winging and a long thoracic nerve injury are made in passing and deemed insignificant. In an independent medical evaluation performed in September, 2006, John Schumpert, MD stated (WCC Trial Exhibit No. 6, at page 6-6), that Appellant presented with a prominent right scapula, but no scapular winging was observed. Yet in that same month of 2006, PA Strine once again saw Appellant in her office and again detected "significant right scapular winging". Trial Exhibit 1-9; WCC Finding ¶ 21.

SUMMARY OF ARGUMENT

The Appellant argues herein that the determination of the Worker's Compensation Court was erroneous because it disallowed rescission of Appellant's settlements based on a WCC-imposed requirement that the Appellant must show that the insurer had no knowledge of the medical diagnosis that

appellant believes to have been erroneous.

The Worker's Compensation Court's Conclusion of Law No. 36 states: "In order to find that the alleged material mistake was mutual to both Keller and Liberty, I must find that Liberty had no knowledge that Keller's medical condition included either scapular winging or long thoracic nerve injury at the time the parties entered into the settlement agreements." Appellant argues herein that this formulation disregards the origin of the mistake of fact [that it originated with the treating physicians], that it mischaracterizes the mistake as unilateral when it was mutual, that the Kruzich decision does not preclude rescission here because the condition mistaken by physicians existed and was documented prior to the settlements, and that the WCC's ruling is an unwarranted barrier to any possible claim of mutual mistake in a workers compensation settlement.

**APPELLANT SEEKS TO RESCIND DUE TO A
MEDICAL ERROR, NOT DUE TO AN UNEXPECTED OUTCOME**

In Kruzich v. Old Republic Ins. Co., supra, this Court held that the Worker's Compensation Court had wrongly rescinded a 1994 settlement in which the claimant sought reopening because in 2004, some sixteen years after the injury and ten years after the settlement, the claimant suffered a Parkinson's type movement disorder that was found to be attributable to the skull fracture and

frontal lobe injury that had required surgery some sixteen years before. In Kruzich this Court stated that unanticipated future medical conditions cannot be permitted as a basis for a finding of mutual mistake justifying rescission.

Liberty Northwest has argued throughout this case that Kim Keller's effort to rescind violates the holding of the Kruzich decision. Liberty's trial brief at Page 12, ¶ 2, states:

"Keller has conceded in her contentions and in her petition, which is a judicial admission, that her thoracic nerve damage and scapular winging were diagnosed at or near the time of her injury and of course by implication when she made her two settlements. What would occur as a result of this injury in the future after each settlement is a prediction."

This misapprehends Keller's argument, which is that although a physician assistant saw the nerve damage and scapular winging, these symptoms were ignored throughout the course of treatment arranged by Liberty when it took Keller's case away from the physician assistant and turned it over to an orthopedic surgeon and other medical doctors who pursued the case the rest of the way to a conclusion.

The rationale of the Kruzich decision is expressed in ¶ 47 as follows:

¶ 47 The public policy of this State is to encourage settlement and avoid unnecessary litigation. [citations omitted.] Thus, we have stated that to encourage settlement and preserve the sanctity of workers' compensation settlement agreements, we will reopen such agreements

only "rarely and reluctantly." [citations omitted.] If we were to uphold the WCC and fashion a new rule that unanticipated future medical conditions could retroactively create mutual mistakes at the time of settlement, then settlement agreements would not be worth the paper they are written on because any unanticipated medical condition would justify rescission.

When Liberty claims that Appellant Keller is only seeking to rescind her settlement because she incorrectly predicted her medical outcome after settlement, it is wrong. There is no issue of a prediction here; rather, there was a medical misunderstanding of the condition; long thoracic nerve injury was noted but slighted by the treating physicians until after the 2007 settlements. This is not the situation of the unanticipated Parkinsonism found in claimant Kruzich or in the other cases where an unanticipated condition developed long after the injury and settlement was concluded.

In Liberty's Trial Brief at Page 12, Third Paragraph from the bottom, Liberty states:

"This is not a misdiagnosis case. The scapular winging diagnosed in 2005 is synonymous with long thoracic neuroathy and Keller made her settlement predicting her ability to work and her settlement predicting breast reduction surgery would reduce her symptoms. The futures she predicted have not come to pass according to her testimony."

On the contrary, this is a misdiagnosis case. The cause of scapular winging was never determined while the injury was in treatment before settlement.

No EMG test was done for it until a year and a half after the 2007 settlements.

Following PA Strine's initial comments and February and March, 2005, the treating doctors did not regard as significant the long thoracic nerve injury.

THE WORKER'S COMPENSATION COURT APPLIED AN INCORRECT BURDEN OF PROOF

The Worker's Compensation Court stated in Conclusion of Law ¶ 36:

¶36 Keller testified at trial that prior to entering into her settlement agreements, she had no knowledge that her medical condition included either scapular winging or long thoracic nerve injury, despite multiple references to these conditions in her records predating her settlement agreements. Assuming for the sake of argument, that Keller was unaware of these conditions, she still has failed to carry her burden of proof that there was a *mutual* mistake of fact. In order to find that the alleged material mistake was mutual to both Keller and Liberty, I must find that Liberty had no knowledge that Keller's medical condition included either scapular winging or long thoracic nerve injury at the time the parties entered into the settlement agreements. (Emphasis supplied.) Keller has submitted no evidence in support of such a finding and indeed such a finding would be contrary to the evidence submitted to the court. Therefore, I must conclude that there was no mutual mistake of fact at the time that Keller and Liberty entered into their settlement agreements.

The above analysis suggests that the Worker's Compensation Court looked at the issue as being whether the mistake was mutual. While a unilateral mistake is not normally grounds for relief, a mutual mistake that is material is. Bailey v. Ewing (1983), 105 Idaho, 636, 671 P2d 1099, 1102, cited in Carey v.

Wallner, 23 Mont. 260 (1986) 725 P2d 557.

The mistake was made by the doctors, not by either of the parties. No EMG was done until 2008, after the claims were settled. Dr. Beck, whose initial diagnosis strongly influenced the direction of treatment when he saw Ms. Keller in 2005, missed the scapular winging in his examination.. In his words:

Q. In Ms. Keller's case, in your opinion, what are the symptoms of the long thoracic neuropathy?

* * *

A. At the time that I saw her on October 23, 2008, she complained of right shoulder and neck pain, particularly when she tried to lift her arm over her head. And she had been evaluated by Dr. Ross who found EMG evidence consistent with long thoracic nerve palsy. And in that evaluation, I agreed that those symptoms were likely related to the long thoracic nerve palsy.

Q. And on your report of October 23, 2008, page 158, first paragraph, you note she's had persistent problem with scapular winging. What is Page 8 scapular winging?

A. Scapular winging is one of the signs of long thoracic nerve palsy where the scapula is not moving properly in concert with motion of the shoulder, and it, to make it simple, sticks out.

Q. Okay. In Ms. Keller's case, is scapular winging in your opinion synonymous with long thoracic radiculopathy?

A. For the most part.

Q. For the most part. In your opinion, is the scapular winging that Ms. Keller has a sign of long thoracic neuropathy?

A. Yes.

Q. Do you have an opinion as to the cause of the long thoracic neuropathy and scapular winging as regards Ms. Keller?

A. I don't, although I have reviewed the records, and there is some evidence that there was -- that she may have had this injury back in 2005, prior to the time that I saw her. However, at the time that I saw her, it was not manifested on physical exam, and it was not part of her presenting complaints, nor was it part of the referring physician's impression.

Q. And when you say when you first saw her, Page 9 could you turn to page 162, please?

A. I'm there.

Q. Right. And is that the first time you saw Ms. Keller?

A. I believe so, yes.

Q. And that would show the presentation as well as the diagnosis at the time?

A. Yes.

Q. Would you turn to page 188, please. MR. TOOLE: 188? MR. JONES: 188, yes.

Q. (By Mr. Jones) Would you take a moment and review that, please.

A. Sure. Okay.

Q. And there's a second page, I believe.

A. Okay.

Q. Would you agree the date of the document, upper right-hand corner, was the date of service, 4/27/05?

OA. Yes.

Q. And under physical examination on page 188, specifically musculoskeletal, there appears a statement, "The spine is straight and symmetrical, but voluntary-appearing splinting is noted. The right scapula and shoulder are intermittently Page 10 raised in a protective position, causing the appearance of scapular winging." Do you see that?

A. Yes, I do.

Q. In your opinion, was the scapular winging present in 2005 the result of the long thoracic neuropathy that Ms. Keller now has?

A. It appears likely to me more likely than not.

9/3/2009 Carter Beck deposition, Pages 6-7. But when asked whether he agreed with the 2008 post-settlement diagnosis of preexisting long thoracic nerve injury, Dr. Beck opined:

Q. I have a report from a Dr. Ross that's page 174 of that, and it would be dated 12/08/08, again, page 174.

A. I have it. Page 6

*

*

*

Q. He did EMG testing. And if I understand his chart, he's diagnosed chronic right long thoracic radiculopathy, producing severe serratus anterior weakness, and a secondary paracervical myofascial syndrome with chronic pain. That's his report; would you agree?

* * *

A. Yes, I agree.

Q. And do you agree with that diagnosis? And I'll refer you to your note, which is page 162, September 20 -- I'm sorry. That would be the second one. Page 158.

* * *

Q. Yes.

A. So I agree with Dr. Ross's assessment Page 7 there, that that's at least part of the diagnosis. I wouldn't say that that's necessarily a complete diagnosis

9/3/2009 Carter Beck deposition, Pages 8-10.

In the instant case, there was a failure to accurately and completely diagnose an injury that was both seen and commented on during the course of treatment. While the Workers Compensation Court concluded that the Appellant must show that the insurer had no knowledge of a diagnosis that was later disregarded, Ms. Keller would respectfully suggest that what must be shown is that the asserted factual underpinning relied on by both parties was an error. That has been the focus of Appellant's proof.

The issue in mutual mistake cases is set out in §28-2-409, MCA, the definition of mutual mistake:

"(1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist or in the past

existence of such a thing which has not existed.”

The statute uses the term "forgetfulness," which is apt here. Treating doctors had access to PA Strine's diagnosis of long thoracic nerve injury, but they did not seek to verify it and they chose to look beyond it. The Worker's Compensation court's formulation requiring proof that the insurer had no knowledge of the existence of a diagnosis by a physician assistant misses the point. A mutual mistake must consist of forgetfulness or unconscious ignorance of a fact material to the contract. Liberty calls this a "prediction" problem but Liberty has never at any time disputed that the evidence of long thoracic nerve injury was in effect ignored or forgotten by all the treating doctors.

The Workers Compensation Court carefully evaluated the medical records and evidence and found that PA Jennifer Strine saw the scapular winging in 2006 long after she had initially seen it. The WCC also noted that the IME doctor, John Schumpert, MD, saw and noted the scapular winging in the medical history. But Dr. Schumpert, in his evaluation, dismissed it as an unrelated scoliosis problem. He concluded, as the WCC noted in Finding of Fact ¶ 20, that Keller had chronic thoracic region myofascial pain, and "chronic right thoracic non-verifiable radicular complaints."

Dr. Beck and Dr. Ross² established with their testimony that this is not

² Dr. Ross testified in deposition:

Q. What, as you review that paragraph, were the prominent features of the history of this injury?

A. Well, Kimberly informed me that her problems began after she had attempted to help a client, a home health client, a heavy individual of 200 pounds or so she estimated sometime prior to January 2005. And as she was trying to pivot the woman, she felt a sharp, in her words, a searing pain across her right shoulder and upper mid back and then followed more pain in the neck and headache that I understood to have persisted. And, in time, as she saw her physician in Thompson Falls and various treatments were applied, it was noted that she had a very pronounced winging, as we say, or prominence of her right shoulder blade, scapula. And at that point, she went on to have the evaluation by Dr. Brown, an orthopedist, and an MRI study undertaken that suggested that she had disk bulges at several of the segments of her mid back, so-called thoracic levels but not findings of abnormal brain or neck injury. No injury within the brain or neck was understood from CT studies. Page 7 She had had some surgery, breast reduction operation, hoping that might help diminish the spasm, of no benefit, and continued have some manipulations by Dr. Lovell and chiropractic treatment, some physical therapy treatments, but with the persistence of this scapular winging. Troy Warling of the Advanced Pain Center here asked that I do nerve conduction testing or EMG testing with the suspicion that she had had a nerve injury.

Q. And then in the next paragraph, you refer to the examination that you did. What did that examination consist of?

A. Well, it was somewhat abbreviated in that our real purpose that day was for me to do the specific nerve testing, but I always like to get a little bit of a sense of hands-on function. And so she had some limitation in her ability to rotate her neck. The rotation to the left was easier for her than to the right. Oh, pardon me. That was incorrect. Rotation to the right was easier than rotation to the left at that time. It did not cause a radiating pain. There were some limitation as well in the ability to tilt side to side, and all of these are Page 8 reflective of the degree of stretch that's possible in the muscles that span from the neck down to the shoulders, but there was a real prominent finding of that bulging or winging of her right shoulder blade, her scapula,

a case involving a "prediction" that Ms. Keller unilaterally chose to believe in. Rather, this case involves a diagnosis that the doctors had before them from a physician's assistant but did nothing about.

Appellant argued to the Worker's Compensation Court that her case was in line with the decision in Gamble v. Sears, 2007 MT 131, 337 Mont. 354, 160 P3d 537. In Gamble, the Worker's Compensation Court had rescinded a settlement involving a retail store worker who suffered a fracture of the odontoid process in her neck when a heavy box fell on her head. This fracture was missed and she had problems for many years. The fracture of the odontoid process was finally found and diagnosed a number of years after the settlement and both the

as she tried to elevate her arm. I didn't see loss of muscle bulk or atrophy or other changes that sometimes occur when nerve pathways to other muscles of the limb are involved. So I did not report atrophy or vesiculations, mostly finding that specific weakness for the muscle that stabilizes the scapula, the one we call the serratus anterior.

Q. And with respect to the serratus anterior, what were your findings?

A. We went on to do the testing that I'm sure Kim remembers fondly for penetrating the muscle with needle probe or electrode and finding that there were the abnormal electrical patterns that indicate that the nerve to that muscle was severely damaged. The other muscles that share at least some of the roots of that nerve pathway for the nerve we call the long thoracic nerve separates from other of the nerves that ultimately supply muscles downstream in the limb. The other Page 9 nerve pathways downstream from where this long thoracic nerve separates itself, all those others were normal.

Q. So the abnormality was capable of being pinpointed on the nerve itself?

A. Absolutely.

9/3/2009 Dean Ross, Pages 6-9.

Worker's Compensation Court and this court determined that it was appropriate to set aside the settlement even though the employer characterized as "overwhelming" the evidence that the odontoid fracture was caused by a natural progression of underlying degenerative disc disease.

In Gamble, the issue was a medical error which occurred during the course of treatment and prior to settlement of the claim. In Kruzich, no such error occurred. In the instant case, there was a medical error similar to what occurred in Gamble and in several other Montana mistake cases, where treating physicians incorrectly or incompletely understood the medical facts of the case during the course of treatment prior to settlement. See, e.g., Weldele v. Medley Development, 227 Mont. 257, 738 P.2d 1281 (1987), where claimant was initially diagnosed only with carpal tunnel syndrome and rotator cuff syndrome, omitting treatment of thoracic outlet syndrome even though it too was [correctly, it turned out] suspected by the treating physicians to have been caused by the injury; Kimes v. Charlies Fam. Din. & Donut Shop, 233 Mont. 175, 759 P.2d 986 (1988), where claimant injured his knee falling down steps, had surgery on a ruptured cruciate ligament, and after settlement it was found he also had also torn a cartilage during his fall which the treating physician had failed to detect, justifying rescission; Wolfe v. Webb, 251 Mont. 217, 824 P.2d 240 (1992), where claimant injured his

upper body, fracturing his left clavicle and dislocating his right clavicle at the sternum, undergoing bilateral clavicle surgeries but leaving shoulder pain untreated before settlement, then finding out after the settlement that two shoulder surgeries were also needed.

Incomplete is the appropriate word to describe the evaluations that all of the treating physicians did in this case. Only the August, 2008 EMG evaluation of the long thoracic nerve injury led to a full understanding of the true circumstances of Appellate's injury.

CONCLUSION

This is not a case involving an "inaccurate prediction" of the future. Nor is it a case where the medical condition was not in existence at the time of the appellant's settlements. This is a case where a condition known to a physician assistant was subsequently disregarded by several treating doctors until an EMG was performed more than a year after Appellant settled both her indemnity and medical benefits.

The limiting language of Kruzich v. Old Republic Ins. Co., supra, has no application here. The Worker's Compensation Court's analysis that Claimant must prove that Liberty had no knowledge of the medical condition is likewise erroneous. Notwithstanding the holding of Kruzich, the words of Kienas v.

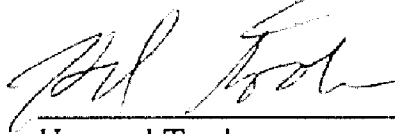
Peterson, supra, 191 Mont. 325, 329 (1980) 624 P2d 1, bear repeating here:

We find both parties were mistaken, and there is evidence of an unconscious ignorance of a fact that is material to the contract. Neither party at the time of entering the full and final compromise settlement knew of the exact nature or extent of the injury suffered by claimant. Neither party was aware of any possible disability caused by injury on the preexisting cerebral palsy condition. This information regarding the state of claimant's injury was not available to claimant or to the State Fund at the time of entering into the full and final compromise settlement. It was not until the hearing to reopen the agreement that testimony from a neurologist indicated that the injury could have aggravated or accelerated the prior cerebral palsy. The Workers' Compensation Court noted in its conclusions of law: "It is unfortunate that the information furnished by Dr. Cooney was not available prior to June, 1978 when claimant made his settlement . . ."

For the foregoing reasons, Appellant respectfully requests this Court to reverse the Workers Compensation Court and direct that that Court enter judgment for Appellant, rescinding the settlements of both the indemnity benefits and the medical benefits, so that the correct medical diagnosis can be the basis for both the compensation and the ongoing medical care for Appellant's injury.

RESPECTFULLY SUBMITTED this 2nd day of July,

2010.



Howard Toole

Attorney for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

Dated this 2nd day of July, 2010.

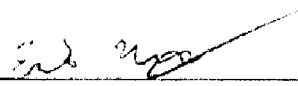
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Attorney for Appellant

By: 
Howard Toole

CERTIFICATE OF MAILING

I, Eric Mundt, legal assistant to Howard Toole, do hereby certify that on the 2nd day of July, 2010, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

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